

From: [Patterson_Robin L CIV OPNAV DNS-36](#)
To: (b) (6) [CTR OPNAV DNS-36](#)
Cc: [Strong_Richard R CIV OPNAV](#)
Subject: FW: [Non-DoD Source] Fwd: Appeal of DHA 17-B; Performance Standards Cygnarowicz
Date: Monday, October 30, 2017 8:03:46
Attachments: [APPEAL-2.PDF](#)

FYI only

Respectfully,

R Patterson
Head, SECNAV/CNO FOIA/PA Program Office (DNS-36)
CNO Office of The Director, Navy Staff
Organization and Management Division
FOIA/PA Service Center 202 685-0412 DONFOIA-PA@NAVY MIL

-----Original Message-----

From: (b) (6) @aol.com [mailto:(b) (6) @aol.com]
Sent: Sunday, October 29, 2017 5:06 PM
To: (b) (6) @mail.mil
Cc: (b) (6) @mail.mil; (b) (6) @dha.mil; (b) (6) @mail.mil; voiceofthecustomer@dha.mil
Subject: [Non-DoD Source] Fwd: Appeal of DHA 17-B; Performance Standards Cygnarowicz

Dear Ms. Allard,

With my respect and continued appreciation to you and your staff, please assist with the administrative appeal below seeking the performance standards of Paul T. Cygnarowicz, Deputy General Counsel, Defense Health Agency.

As you can see, this administrative appeal was filed and also sent electronically EIGHT MONTHS AGO: 2/22/2017 5:22:29 AM Eastern Standard Time.

I am not seeking any personal information, just the rating standards themselves. Note that DHA's FOIA officer released her own standards without any claim of exemption, as have multiple other agencies for their personnel.

Please determine if DHA reported this aged administrative appeal on DHA's FY annual FOIA Reports submission. Please also determine the delay in acting on this appeal and if DHA is processing appeals in the order in which they are received.

Please advise Ms. Chung, and thru her Mr. Tillotson, of my ongoing concerns regarding the integrity of the FOIA/PA processes and the accuracy of reporting to the Attorney General of the United States and Congress.

As the addressees to this email know, DOD's FOIA and Privacy Act Programs are overseen by the honorable Mr. David Tillotson III (Deputy Chief Management Officer, Office of the Secretary of Defense) and, his fine compliance staff (Joo Clung (Senior Executive Service), Cindy Allard, James P. Hogan, et al), and Reports are submitted to the Attorney General and to Congress under his good name, based on information provided to his staff.

Mr. Tillotson is entitled to know the full extent of any inaccurate/false reporting submitted in his good name and the degree of the lack of integrity in the FOIA and Privacy Act processes by DOD's subordinate reporting commands. He is entitled to know the standards set for those holding appellate authority within DOD. The American Citizens are entitled to know.

I will be following up again soon; also considering other venues.

Vice Admiral Bono, with my deep respect, please review the actions of your staff operating under your delegated authority.

Thank you both.

With my deep respect,

Robert Hammond

cc: Multiple

From: (b) (6) @aol.com
To: dha ncr dgc-fc list ogc-foia-appeals-owners@mail.mil
Sent: 2/22/2017 5:22:29 AM Eastern Standard Time
Subject: Appeal of DHA 17-B; Performance Standards Cygnarowicz

Robert Hammond

(b) (6)

(b) (6) @aol.com

February 18, 2017

Office of General Counsel
National Capital Region Medical Directorate
Defense Health Agency
8901 Wisconsin Avenue (Building 27)
Bethesda, MD 20889
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dha ncr dgc-fc list ogc-foia-appeals-owners@mail.mil

Also sent by certified mail: 7016 2710 0000 7877 0038

Subject: Appeal of My FOIA Request – Performance Standards of Paul T. Cygnarowicz, Deputy General Counsel, Defense Health Agency

My Personal Reference Number: FOIA DHA 17-B

Assigned Agency FOIA Control Number 2017-041

References: (a) The Freedom of Information Act (FOIA)

(b) The Privacy Act

(c) CFR 164.526

(d) DoD 5700.7-R, September 1998, DoD Freedom of Information Act (FOIA) Program

(e) DoD 6025.18-R, Jan. 24, 2003, DoD Health Information Privacy Regulation

(f) Joint publication of U.S. Department of Justice, Executive Office of the President and U.S. General Services Administration of July 2011: "Your Right to Federal Records" (see <http://publications.usa.gov/USAPubs.php?PubID=6080>)

(g) DoD 5400.11-R, May 14, 2007, Department of Defense Privacy Program

(h) Department of Justice Freedom of Information Act Guide, May 2004 at Exemption 6 <http://www.justice.gov/oip/foia-guide-2004-edition-exemption-6>

(i) GAO Report GAO-12-828 of July 2012, subject Freedom of Information Act

Dear Sir:

This appeal is submitted under the references above for my FOIA request dated January 10, 2017 at Enclosure (1) seeking the Performance Standards of the position occupied by Paul T. Cygnarowicz, Deputy General Counsel, Defense Health Agency. The Agency's denial letter is at Enclosure (2). The Agency is improperly denying my request in full, inappropriately citing the FOIA Exemption (b)(6) and asserting that release would constitute a clearly unwarranted invasion of personal privacy under 5 U.S.C. 552(b)(6). There is no personal privacy interest in the information sought. This request does not seek any privacy information about Mr. Cygnarowicz. It only seeks the performance standards for the position under which Mr. Cygnarowicz is serving and not Mr. Cygnarowicz's performance rating under those standards. This denial is capricious, arbitrary and a misuse of the privacy exemption.

Records sought under FOIA. I am respectfully seeking:

- The performance standards Paul T. Cygnarowicz, Deputy General Counsel, Defense Health Agency for the current and most recent past rating period.
- A copy of this FOIA Request letter returned with the DHA reply, which is an agency record.

Discussion

· The performance standards will show if the Deputy General Counsel, Defense Health Agency is being evaluated against applicable laws, regulations and policies

· DHA has released the performance standards of the DHA FOIA Officer pursuant to a similar request (as have other DoD entities), making the DHA denial capricious, arbitrary and otherwise contrary to governing laws, regulations and policies (enclosure (3))

· Pursuant to FOIA:

“Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.” 5 U.S.C. § 552(a)(4)(F)(i)

· Release of Segregable Portions

o I contend that every item sought under my FOIA request is fully releasable without redaction in accordance with reference (g). Notwithstanding that, the Agency is making the ridiculous assertion that the performance standards Agency’s Chief, DHA Privacy and Civil Liberties Office (a federal employee) is exempt under 5 U.S.C. 552(b)(6). The Agency must justify each item being withheld.

o The FOIA requires that any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.

o Further, when a requested document contains some information which falls under one of the exemptions, the FOIA requires that all non-exempt portions of the record must still be released. The Act expressly mandates that any “reasonably segregable portion” of a record must be disclosed to a requester after the redaction (the deletion of part of a document to prevent disclosure of material covered by an exemption) of the parts which are exempt. 5 U.S.C. § 552(b). This is a very important aspect of FOIA because it prohibits an agency from withholding an entire document merely because one line, one page or one picture are exempt.

· Strong Presumption in Favor of Disclosure

o “In the Act generally, and particularly under Exemption (6), there is a strong presumption in favor of disclosure.” Local 598 v. Department of Army Corps of Engineers, 841 F.2d 1459, 1463 (9th Cir. 1988) (emphasis added). In that case, the Ninth Circuit reviewed the context of applicable Exemption 6 case law:

- The Freedom of Information Act embodies a strong policy of disclosure and places a duty to disclose on federal agencies. As the district court recognized, ‘disclosure, not secrecy, is the dominant objective of the Act.’ Department of the Air Force v. Rose, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976). ‘As a final and overriding guideline courts should always keep in mind the basic policy of the FOIA to encourage the maximum feasible public access to government information.’ Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 715 (D.C. Cir. 1977). As a consequence, the listed exemptions to the normal disclosure rule are to be construed narrowly. See Rose, 425 U.S. at 361, 96 S.Ct. at 1599. This is particularly true of Exemption (6). Exemption (6) protects only against disclosure which amounts to a ‘clearly unwarranted invasion of personal privacy.’ That strong language ‘instructs us to ‘tilt the balance [of disclosure interests against privacy interests] in favor of disclosure.’”

- Id. (emphasis added), citing Washington Post Co. v. Department of Health and Human Servs., 690 F.2d 252, 261 (D.C. Cir. 1982) (quoting Ditlow v. Shultz, 517 F.2d 166, 169 (D.C. Cir. 1975)).

· Public Interest. The public is entitled to this information.

Basis for Appeal

I am appealing that the Agency:

(1) has improperly denied my request under 5 U.S.C. 552(b)(6);

(2) notwithstanding the improper denial above) has not provided all reasonably segregable portions of documents, nor properly justified and accounted for any redactions;

(3) did not provide a copy of my Request, which is an agency record;

(4) did not provide records in the requested format of electronic PDF by return email so that there can be no question about what DHA provided or when

(5) Afforded an inconsistent period of time for filing an appeal (90 days vice 60 for other appeals), perhaps hoping that I would take additional time in filing the appeal;

(6) Is acting in a capricious and arbitrary manner in that DHA – Ms (b) (6) personally – has already released the performance standards of the DHA FOIA Officer (Ms (b) (6))

Appellate Authority Action Sought I am seeking that:

- (1) each element of the basis of my appeal be addressed separately;
- (2) each element of my appeal be sustained;
- (3) my FOIA request be remanded back to the Agency for direct reply to me; and,
- (4) I be granted new appellate rights following a subsequent reply by the Agency

Some Additional References

· Department of Justice Freedom of Information Act Guide, May 2004 at Exemption 6 <http://www.justice.gov/oip/foia-guide-2004-edition-exemption-6>, states:
o Personal in-formation about FOIA requesters, however, such as home addresses and home telephone numbers, should not be disclosed (62)
<http://www.justice.gov/oip/foia-guide-2004-edition-exemption-6#N_62> In addition, the identities of first-party requesters under the Privacy Act of 1974 (63)
<http://www.justice.gov/oip/foia-guide-2004-edition-exemption-6#N_63> should be protected because, unlike under the FOIA, an expectation of privacy can fairly be inferred from the personal nature of the records involved in those requests (64) <http://www.justice.gov/oip/foia-guide-2004-edition-exemption-6#N_64>

o Note that the Agency did not follow the FOIA requirement to provide me case a tracking number within ten days and did not then comply with statutory and regulatory requirements to complete the request within twenty days

· DoD 5400 11-R, May 14, 2007, paragraph C1 5 3 states: “Avoidance of Procedural Obstacles DoD Components shall ensure that procedural matters do not unnecessarily impede a requester from obtaining DoD records promptly Components shall provide assistance to requesters to help them understand and comply with procedures established by this Regulation and any supplemental regulations published by the DoD Components ”

· DoD 5400 11-R, May 14, 2007 paragraph C1 5 1 states, “DoD personnel are expected to comply with the FOIA, this Regulation, and DoD FOIA policy in both letter and spirit This strict adherence is necessary to provide uniformity in the implementation of the DoD FOIA Program and to create conditions that will promote public trust ”

· Legal Framework of FOIA:

1 The definition of “records” includes:

“[A]ll books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them ” 44 U S C § 3301 (emphasis supplied)

2 FOIA requires each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person 5 U S C § 552(a)(3)(A)

3 FOIA requires that “ each agency shall— (A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request ” 5 U S C § 552(a)(7)(A)

4 FOIA requires that, “In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format ” 5 U S C § 552(a)(3)(B)

5 FOIA requires that each agency shall “establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including the date on which the agency originally received the request; and an estimated date on which the agency will complete action on the request 5 U S C § 522(a)(7)(B)

6 determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal 5 U S C § 522(a)(6)(A)

7 FOIA also requires federal agencies to make a final determination on FOIA administrative appeals that it receives within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal, unless the agency expressly provides notice to the requester of “unusual circumstances” meriting additional time for responding to a FOIA request 5 U S C § 552(a)(6)(A)(ii)

8 FOIA expressly provides that a person shall be deemed to have constructively exhausted their administrative remedies if the agency fails to comply with the applicable time limitations provided by 5 U S C § 552(a)(6)(A)(I) - (ii) See also 5 U S C § 552(a)(6)(C)

9 FOIA provides that any person who has not been provided the records requested pursuant to FOIA, after exhausting their administrative remedies, may seek legal redress from the Federal District Court to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant

10 Regarding the names of the FOIA requesters, the courts have held that under the FOIA requesters do not have an expectation of privacy *Stauss v IRS*, 516 F Supp 1218, 1223 (D D C 1981),

11 Under FOIA, the federal agency has the burden of sustaining its actions 5 U S C § 552(a)(4)(B)

12 Pursuant to FOIA, a Court may assess attorney fees and litigation costs against the United States if the Plaintiff prevails in an action thereunder 5 U S C § 552(a)(4)(E)

13 Pursuant to FOIA:

“Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.” 5 U S C § 552(a)(4)(F)(i)

14 Department of Justice (DOJ) has issued a handbook addressing FOIA Annual Reports. See DOJ, Handbook for Agency Annual Freedom of Information Act Reports, “Disposition of FOIA Requests,” (available at http://www.justice.gov/sites/default/files/oip/pages/attachments/2014/11/04/departement_of_justice_handbook_for_agency_annual_freedom_of_information_act_reports.pdf) (“DOJ Handbook”)

15 Among other things, the DOJ Handbook states, “All requests (perfected and non-perfected), appeals, and consultations that were pending at any time during the relevant fiscal year [October 1st through September 30th] will be captured.”

16 The DOJ Handbook also states:

“[E]ach agency is ultimately responsible for the accuracy and completeness of its Annual FOIA Report. It is therefore essential for agencies to take steps that will ensure that they are adequately tracking all of the information necessary to complete the Annual FOIA Report sections detailed below. Agencies that utilize a tracking or case management system for this purpose are responsible for ensuring that the system they are using can produce an accurate Annual FOIA Report that is in compliance with the law and Department of Justice guidance.” DOJ Handbook, at 3

This appeal is separate and distinct from any other appeals that I may file and may not be combined with any other appeal. I am not agreeing to combining separate appeals, as this would be improper, potentially distorting FOIA reporting to the United States Attorney General and impeding separate judicial review (if that becomes necessary). If you deny all or any part of this appeal, please cite each specific exemption you think justifies your determination and notify me of further remedies available under the law.

I will greatly appreciate your thoughtful and timely consideration of my request. Please contact me if you have any questions regarding this request. Thank you in advance.

With my respect,

Robert Hammond

Enclosures: (1) Hammond FOIA Request 17-A

(2) DHA Denial Letter

(3) Performance Standards of Nadine Brown Released Pursuant to FOIA

62 See FOIA Update, Vol VI, No 1, at 6

63 5 U S C Â§ 552a (2000)

64 See FOIA Update, Vol VI, No 1, at 6